

OCT 23 2000

FEDERAL ELECTION COMMISSION
999 E. Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

RE: MUR 4922
DATE FILED: 8/31/99
DATE ACTIVATED: 3/20/00

Statute of Limitations: 10/30/03
Staff Member: Marianne Abely

COMPLAINANT: Brent Christensen

RESPONDENT: Suburban O'Hare Commission

RELEVANT STATUTES: 2 U.S.C. § 434(c)
2 U.S.C. § 441b
2 U.S.C. § 441d
11 C.F.R. § 110.11(a)(1)
11 C.F.R. § 100.22
11 C.F.R. § 114.2(b)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by a complaint submitted by Brent Christensen¹ ("complainant") alleging a violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), by the Suburban O'Hare Commission ("SOC" or "respondent").² Without citing any specific statute or regulation, the complaint asserts that the SOC violated the FECA by expressly advocating the election of several

¹ The complainant is the Democratic candidate for Congress in Illinois' 6th District. His opponent is the current congressman, Henry Hyde.

² Mr. Christensen filed a previous complaint against the SOC, alleging that an advertisement sponsored by the group that ran on April 23, 1999 contained prohibited express advocacy. In February 2000, the Commission, exercising its prosecutorial discretion, voted to take no further action in that case, designated as MUR 4896.

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candidates for federal office in a newsletter, called the "SOC News," issued immediately prior to the 1998 general election. The SOC, through counsel, has responded to the complaint, denying that the newsletter contained express advocacy.

II. FACTUAL AND LEGAL ANALYSIS

A. The Applicable Law

1. 2 U.S.C. §§ 434(c) and 441b

Section 441b(a) of the Act generally prohibits corporations from using general treasury funds to make a contribution or expenditure, including an independent expenditure,³ in connection with federal elections. However, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("MCFL"), the Supreme Court held, *inter alia*, that section 441b's prohibition of independent expenditures from a corporation's general treasury funds cannot be applied constitutionally to a "class of organizations" that, although corporate in form, do not present the dangers that section 441b is designed to prevent. The Court determined that such organizations have three distinct features. First, the corporation has been "formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. Second, the corporation does not have "shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* Finally, the corporation "was not established by a business corporation or a labor union, and it has in place a policy not to accept contributions from such entities." *Id.*

³ The term expenditure includes any purchase, payment, distribution, loan, advance deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(9) and 11 C.F.R. § 114.1(a)(1). Independent expenditures are expenditures made without cooperation or consultation with any candidate that finance communications expressly advocating the election or defeat of a clearly identified candidate. 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16.

In 1995, the Commission promulgated 11 C.F.R. §114.10, implementing 2 U.S.C. § 441b in light of *MCFL*. This regulation sets forth five specific criteria that must be met by the entity in order to achieve the status of a "qualified nonprofit corporation." First, the corporation would have to have as its only express purpose the promotion of political ideas. 11 C.F.R. § 114.10(c)(1). Second, the corporation could not engage in business activities. 11 C.F.R. § 114.10(c)(2). Third, the corporation must not have shareholders or other persons who are affiliated in such a way that they might be able to make a claim on the organization's assets or earnings; or have any persons who have been offered a benefit such that it would act as a disincentive for them to disassociate themselves from the corporation on the basis of a difference of opinion with the corporation on a political issue. 11 C.F.R. § 114.10(c)(3). Fourth, the corporation could not have been established by a business corporation or a labor organization, and must not accept contributions, directly or indirectly, from business corporations or labor organizations. 11 C.F.R. § 114.10(c)(4). Finally, the corporation must be described in 26 U.S.C. § 501(c)(4). 11 C.F.R. § 114.10(c)(5).⁴ In addition, when these corporations make independent expenditures they are required to certify in writing to the Commission that they are in fact eligible for the exemption from the prohibitions against corporate expenditures. 11 C.F.R. § 114.11(e)(1). Pursuant to 2 U.S.C. § 434(c), qualified non-profit corporations and other persons that make independent expenditures in support or in opposition to a federal candidate aggregating in excess of two hundred and fifty dollars

⁴ Section 501(c)(4) describes a class of organizations known as social welfare organizations which are not organized for profit, but are operated exclusively for the promotion of social welfare, and which are exempt from certain tax obligations. *Explanation and Justification for Regulations on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 FR 35292, 35301 (July 6, 1995). Such organizations are allowed to participate in a limited amount of political activity. *Id.* However, filing for 501(c)(4) status is permissive rather than required, which is why the regulation is phrased as it is. *Id.* at 35302.

(\$250) in a calendar year must file reports with the FEC in accordance with 11 C.F.R. §§ 109.2 and 114.10(e)(2).

2. Express Advocacy

In *MCFL*, the Supreme Court also held that the prohibition on corporate expenditures applies only to expenditures for communications that contain "express advocacy" of the election or defeat of a clearly identified candidate for federal office. 479 U.S. at 249. In so holding, the Court relied on its earlier decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which had "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *MCFL*, 479 U.S. at 249. In *Buckley*, the Court gave examples of "express words of advocacy," which included phrases "such as 'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n. 52.

Although the Supreme Court in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b," 479 U.S. at 249, the Court demonstrated in that case that the prohibition could be applied to a communication containing both issue and express advocacy. In *MCFL*, the newsletter at issue bore the headline on the first page "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and stated that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced print on the last page, next to which was a disclaimer: "This [newsletter] does not represent an endorsement of any particular candidate." A coupon was provided that could be taken to the polls to remind voters who were the "pro-life" candidates. In addition, the newsletter

listed all the candidates running for election in Massachusetts, identified each as supporting or opposing certain issues, but featured pictures of only those candidates whose positions were consistent with those of *MCFL*. 479 U.S. at 243. Based on these facts, the Court held that the newsletter contained "express advocacy:"

The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The [newsletter] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The [newsletter] goes beyond issue advocacy to express electoral advocacy. The disclaimer cannot negate this fact.

Id. at 249.

FEC v. Furgatch, 807 F.2d 857, 862-864 (9th Cir.) *cert. denied*, 484 U.S. 850 (1987) ("*Furgatch*"), concerned a negative advertisement about President Carter placed three days before the 1980 general election. After criticizing President Carter, the advertisement stated, "If he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion. . . ." It then concluded, "DON'T LET HIM DO IT." 807 F. 2d at 858. The Ninth Circuit held that this advertisement included express advocacy. In reaching its decision, the *Furgatch* court noted that limiting a finding of express advocacy to speech that utilized the so-called "magic words" of *Buckley* "would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Act." *Id.* at 863. In determining that *Buckley* does not draw a bright and unambiguous line on this issue, the Court concluded that express advocacy includes any message that, "when read as a whole, and with limited reference to external events, [is]

susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. The court then adopted a three part test:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some sort of action. *Id.*

In 1995, the Commission promulgated 11 C.F.R. § 100.22 to provide guidance on the concept of express advocacy in accordance with judicial interpretations, including *Buckley*, *MCFL*, and *Furgatch*. The final rule, in its entirety states:

Expressly advocating means any communication that –

- (a) uses phrases such as "vote for the President," "re-elect your congressman," "support the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters or bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76", "Reagan/Bush," or "Mondale!"; or
- (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because-

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.⁵

Recently, the issue of express advocacy in a corporate context was addressed by a federal court in the Virginia case of *FEC v. Christian Coalition*, 52 F.Supp. 2d 45 (D.C.D.C. 1999) ("*Christian Coalition*"). The court looked at several communications distributed by the Christian Coalition during the 1994 election cycle and found that one, a mailing issued by the Coalition's Georgia affiliate, contained express advocacy and therefore violated the prohibition on corporate expenditures. Based on prior case law, particularly *MCFL*, this court determined that to be express advocacy a communication must "in effect contain an explicit directive," which takes the form of an "action verb or its functional equivalent." According to the *Christian Coalition* court, once the speaker and the content have been identified, a communication will be considered express advocacy only in those instances where a reasonable person would understand that the speech used, considered in the context of the entire communication, contained an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate. *Id.* at 62.

⁵ Two appellate courts have determined that part (b) of this regulation is invalid. *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). On September 22, 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits. In January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. 100.22(b) anywhere in the country. *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668 (E.D. Va. 2000). The FEC has filed an appeal of the injunction.

The mailing at issue in the *Christian Coalition* case was distributed immediately prior to Georgia's July primary. Under the heading, "State Coalition Update – July 1994," the cover letter stated, in part:

The Primary elections are here! On Tuesday, July 19, Georgians will nominate Democratic and/or Republican candidates for the offices of: Governor, Lt. Governor, Insurance Commissioner, Congress, Public Service Commissioner and the State Legislature. To help you prepare for your trip to the voting booth, we have enclosed a complementary voter ID card. This personalized card lists your congressional district and your State House and State Senate districts. We have also enclosed a Congressional Scorecard which you may take to the voting booth. The only incumbent Congressman who has a Primary election is Congressman Newt Gingrich – a Christian Coalition 100 percenter. Make sure that you save this scorecard for November, however, because all other Congressmen are opposed in the General Election.

Id. at 58.

The court found that this mailing, which was clearly directed to the reader as voter, constituted express advocacy as it pertained to the candidacy of Newt Gingrich. While the enclosed scorecard did not overtly tell readers who they should vote for, the court found that the cover letter clearly promoted Congressman Gingrich's candidacy. Readers were specifically told that while the scorecard was for use in the voting booth, it really was not needed for the Congressional primary, because the only challenged incumbent was Newt Gingrich and he was a "100 percenter." Further, the court noted that while Mr. Gingrich's elevated standing with the Christian Coalition is explicitly highlighted, and while the recipients of the mailing are informed that the seat is contested, the opponent is never identified. The court found that "the unmistakable meaning of the letter is that because Newt Gingrich has voted as the Coalition would have wanted him to on every vote the Coalition considered significant, the reader should vote for him in the

primary election.” *Id.* at 65. Moreover, “[w]hile marginally less direct than saying ‘Vote for Newt Gingrich,’ the letter in effect is explicit that the reader should enter the voting booth with the knowledge that Speaker Gingrich was a ‘Christian Coalition 100 percenter’ and therefore the reader should vote for him.” *Id.* The court also noted that “while the ‘express advocacy’ standard is susceptible of circumvention by all manner of linguistic artifice, merely changing the verb ‘vote’ into the noun ‘trip to the voting booth’ is insufficient to escape the limited reach of ‘express advocacy.’” *Id.*

3. 2 U.S.C. § 441d

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, direct mailing, or other type of general political advertising, such communications shall, if not authorized by any candidate or candidate committee, contain a disclaimer in accordance with 2 U.S.C. § 441d. This disclaimer must state clearly who paid for the communication and state whether it was authorized by any candidate. 2 U.S.C. § 441d(a)(3) and 11 C.F.R. § 110.11(a)(1). This requirement applies to communications issued by qualified non-profit corporations. 11 C.F.R. § 114.11(g).

B. Summaries of Complaint and Response

1. Complaint

The complaint, written in the form of a two page affidavit, alleges that on or about October 30, 1998, shortly before the 1998 general election, the SOC mailed to numerous registered voters in Illinois’ 6th Congressional District a newsletter that, “when read in its

totality and drawing all reasonable inferences," expressly advocated the election of several candidates for office, including Henry Hyde, who was running for re-election in that district. (A complete copy of the newsletter is attached to the SOC's response.) The complaint describes the SOC as a consortium of fifteen (15) Illinois municipal corporations,⁶ publicly funded by assessments on its member municipalities and by Illinois state grants. The complainant contends that the publication at issue contains express advocacy because it described specific problems for voters caused by O'Hare International Airport, proposed solutions, and identified Henry Hyde as the candidate supporting those solutions without identifying his opponent. In addition, complainant states that the publication identifies Congressman Hyde as "[a] tenacious and aggressive fighter on our behalf on the issues of O'Hare expansion" and claims that "it is essential that we have a strong and knowledgeable advocate on this issue as our Congressman."

2. Response

The SOC contends that the complaint in this matter is without merit. After providing background on the organization, the respondent addresses two specific issues, those of express advocacy and the lack of a disclaimer.

The response describes the SOC as a "governmental body organized under the Constitution and laws of the State of Illinois." In the caption on the first page of the response, the SOC is additionally described as "an unincorporated association of Illinois municipal corporations." According to the SOC, since the group's formation in 1981, it

⁶ In 1998, all the member communities were contained within Cook and DuPage Counties. These communities were: Addison; Bensenville; Des Plaines; DuPage County; Elk Grove Township; Elmhurst; Harwood Heights; Itasca; Lisle; Maine Township; Park Ridge; Schiller Park; and Wood Dale.

has engaged in a wide range of activities relating to the impact of O'Hare Airport on the citizens of its member communities. These activities have included performing research and issuing reports on the environmental and public safety implications of airport expansion, funding the legal battle that resulted in funding for school sound proofing, and operating and maintaining a radar and noise monitoring system. In addition, according to the response, the group has sponsored community forums where elected officials and candidates for office are invited to speak on airport related issues, placed advertising in local and regional newspapers, and published a periodic newsletter. The respondent states that over the years a "variety of newsletters" have been mailed out to residents. The "SOC News" has identified issues relating to the operation of the airport and proposals to expand its capacity and also urged "citizens to exercise their electoral franchise to achieve relief and protection" from environmental problems and safety hazards.

The respondent asserts that the SOC newsletter that is the target of Mr. Christensen's complaint did not contain express advocacy. It is the SOC's position that judicial authority requires that the language at issue explicitly call for a vote for or against a clearly identified candidate in a federal election. Respondent admits that while this particular "SOC News" discusses the efforts of both Congressmen Jackson and Hyde to prevent airport expansion and praises them for these efforts, it contends that it does not come close to utilizing the specific type of advocacy language required by the applicable case law, such as "Vote for Hyde, Vote for Jackson" or "Elect Hyde" or "Elect Jackson." The respondent maintains that this newsletter represents a classic example of the issue oriented communication that is absolutely protected by the First Amendment. According

to the SOC, the newsletter is really nothing more than an extensive discussion of some of the important environmental, public health and safety issues associated with efforts to expand O'Hare Airport. The purpose of the newsletter, the SOC contends, "was to alert voters to vote in the next general election and that their vote would have a major impact on whether the Hyde-Jackson solution would be implemented." According to the SOC, the complainant's attempt to "create express advocacy by inference" is plainly against the weight of judicial authority.

Having contended that the newsletter does not contain a direct admonition to elect Henry Hyde or Jesse Jackson, Jr., the SOC's further discussion as to why the newsletter does not contain express advocacy focuses almost exclusively on whether the communication contained therein violated 11 C.F.R. § 100.22(b). The respondent asserts that the standard articulated in that subsection cannot be used to determine whether the newsletter contains express advocacy as a variety of federal courts have held that its underlying rationale is unconstitutional and void.⁷ However, it is also the SOC's position that, even if the Commission were to review this matter pursuant to that subsection, which it terms "the implied express advocacy test," the complaint would have to fail. According to the respondent, the "reasonable person" standard of 11 C.F.R. § 100.22(b) requires that no one reading the newsletter could come to any other conclusion than that the SOC was urging the readers to vote for a clearly identified candidate. The organization maintains, however, that when the publication is read in its entirety, it

⁷ The respondent specifically refers to the following cases: *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997), *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996) and *Right to Life of Dutchess County, Inc. v. Federal Election Commission*, 6 F.Supp. 2d 248 (S.D.N.Y. 1998).

cannot be said that all reasonable persons reading it would understand that it was advocating the election of a clearly identified candidate, namely Mr. Hyde. Specifically, it is the respondent's position that because there is a debate between the SOC and Mr. Christensen as to the purpose of the newsletter, the implied advocacy test is not satisfied. This newsletter, the respondent asserts, merely urged readers to use their franchise "to make sure that they got relief" from the negative environmental effects of O'Hare Airport. According to the respondent, any statements of fact included in the newsletter related to Mr. Hyde's involvement on these issues should not be "contorted" into an implied form of express advocacy.

Focusing on 2 U.S.C. § 441d and 11 C.F.R. § 110.11, the respondent asserts that as the publication did not contain language explicitly urging the election or defeat of a particular candidate for federal office, a disclaimer notice that the newsletter was not authorized by a candidate was not required. Nonetheless, the SOC includes as an exhibit to its response an affidavit signed by John C. Geils, current Chairman of the SOC. In this affidavit, Mr. Geils states that the organization paid for the "advertisement" and that it was not authorized, directed or requested by any candidate, candidate's agent or political committee.

C. Analysis

1. Did the SOC News Contain Express Advocacy?

The issue of the "SOC News" that is at the heart of this matter appears from the copies provided by the parties to contain three pages of text with a cover page. It appears that in its final format the publication was folded in half so that one side of the cover page provides mailing information and the other half contains a chart outlining the positions of

the gubernatorial and U.S. senatorial candidates on the issues of O'Hare expansion and a new regional airport.⁸ The words "**VOTE ON NOV. 3**" are positioned in large bold-faced type immediately beneath the chart. Although a congressional seat encompassing a large part of that area (the Illinois 6th Congressional District⁹) was going to be on the November ballot, the positions of the congressional candidates are not provided on this chart. Considering the condition of the canceled stamp on one of the copies provided, it is not possible to state exactly when this mailing was distributed, although the complainant alleges, and the respondent does not deny, that the newsletter was printed and distributed on or about October 30, 1998.

On the first page in large, bold type are the words - "**TUESDAY - NOVEMBER 3 KEY VOTE ON NEW O'HARE RUNWAYS, O'HARE EXPANSION.**" At several points on this page the importance of the upcoming election to the SOC is noted: "On Tuesday November 3, voters in Suburban O'Hare Commission (SOC) communities have a critical opportunity to decide the future of our communities and the related issue of O'Hare expansion." "On November 3, we will elect a new governor, a new United States Senator, a Congressman, and numerous other state and local officials. The new Governor, the new United States Senator, and our Congressman will be key players in the decisions as to O'Hare expansion - including new runways and O'Hare air traffic growth being pushed by Chicago." It is further stated that, "your vote on November 3 for candidates for these offices will decide your future." The SOC also informs readers that

⁸ Congressman Hyde along with Congressman Jackson had announced the intention to query the 1998 Gubernatorial and Senatorial candidate on their positions on these two issues. See, Response, Exhibit 2, pge. 5.

⁹ The candidates for the Illinois 6th District were the incumbent, Henry Hyde (R), Thomas Cramer (D), and George Meyer (LBT). The results in the General Election were as follows: Hyde - 67.35%; Cramer - 30.12%; and Meyer - 2.53%.

while the organization "...is non-partisan and does not endorse any particular candidate," the SOC "believe[s] it is critical that you know the positions of the major candidates on these issues." The rest of the first and the entire second page describes the various environmental and public safety problems that would result from airport expansion and the proposed SOC endorsed solution, called the Hyde-Jackson Partnership.¹⁰ On the bottom of the second page in large bold typeface are the words "**VOTE ON NOV. 3.**"

The final page is bordered with two phrases bolded for emphasis; at the top is the question "**Who can do something about the O'Hare problem and the Hyde-Jackson 'WIN/WIN' solution?**" and at the bottom of the page are the words "**VOTE ON NOV. 3.**" The text on that page informs readers that among the key officials who can keep the problem from getting worse and "solve the current problems" are "the new Governor, the new United States Senator, and our Congressman." The remaining paragraphs are devoted to providing more information about the offices, both federal and state/local, on the November ballot. One paragraph is devoted to the seat of United States Senator. The power of the role is discussed and is termed "critical to the battle over airport expansion." The names of the Senate candidates as well as their positions on the issues are listed on the outside page of the newsletter. With respect to this race, the SOC states a preference for an "independent voice" to work with the Governor and

¹⁰ In 1998, Jesse Jackson, Jr. was the congressman for Illinois' 2nd District. This particular congressional race is not discussed in this issue of the "SOC News" probably because none of the SOC member communities were contained within the 2nd Congressional District. Twelve out of the fifteen towns and townships were, however, within the 6th Congressional District.

Congressmen Hyde and Jackson on the airport issue.

The third paragraph ostensibly discusses the position of Congressman Hyde. Unlike the prior paragraphs this one goes beyond a discussion of the office and its impact on the issues to present a laudatory description of Henry Hyde, who was running for re-election. In fact, Henry Hyde was the only federal candidate running in the SOC areas who is specifically named in the body of the newsletter. The paragraph begins with the sentence, "Congressman Hyde has been a tenacious and aggressive fighter on our behalf on the issues of O'Hare expansion." It goes on to state that he "single-handedly" limited expansion of air traffic by preventing the addition of 60 new slots at O'Hare. Readers are then advised that the debate over issues related to air travel in Illinois would be a central focus of the 1998 Congress and that "[i]t is essential that we have a strong and knowledgeable advocate on this issue as our Congressman."¹¹ In this one paragraph, the newsletter provides a description of Mr. Hyde's history of achievement for the SOC community and makes clear SOC's preference that he be allowed to continue his work during the upcoming session of Congress.

Based on the four corners of this document, with little reference to external facts, it appears that the newsletter contains express advocacy. The newsletter urges readers to vote in the November 3rd election three times and repeatedly emphasizes the importance of the election to the SOC's agenda.

From start to finish, the newsletter prompts electoral action on the part of its readers. The exhortation to "**VOTE ON NOV. 3**" is found in large, bold-face type on

¹¹ It is not known at this juncture in the investigation what positions Mr. Cramer and Mr. Meyer, Henry Hyde's opponents, held with regard to the expansion of O'Hare Airport and the development of a new regional airport.

three out of the four pages of the newsletter. Additional words of action and advocacy, such as "we will elect", "your vote...will decide your future" and "your vote on November 3 will determine the future" are sprinkled throughout the body of the newsletter. Moreover, electoral action specifically advocated by the SOC is geared towards generating support for one candidate in particular, Henry Hyde. The SOC wants readers to know that it is critical that "our Congressman," who was actively working on their behalf regarding the airport, be returned to Congress on November 3rd.

In many ways the SOC newsletter resembles the newsletter found to contain express advocacy in *MCFL*. Just as the newsletter in *MCFL* urged readers to vote "pro-life," the SOC newsletter impresses upon its readers the critical role of the election for SOC's most important goals. Like the organization in *MCFL*, the SOC goes beyond a discussion of issues with respect to Congressman Hyde. While the SOC did not provide a photograph of Mr. Hyde, it does single him out with vivid language on the last page as the candidate whose positions are absolutely consistent with those of the SOC. No mention is made of Mr. Hyde's opponents in the election.¹² Thus, just like the newsletter at issue in *MCFL*, the SOC newsletter in the instant case "goes beyond issue advocacy to express electoral advocacy." *Id.* at 249. As in the *MCFL* case, the newsletter "provides in effect an explicit directive: vote for" Henry Hyde. "The fact that the message is marginally less direct than 'vote for [Hyde]' does not change its essential nature." *Id.* The fact that the SOC states on the first page that it is non-partisan and gives no

¹² Indeed the references in the text to "our Congressman" as opposed to the "new" Governor and the "new" Senator (even though the incumbent was running for re-election) makes it appear that there is no choice other than Henry Hyde for Congressman.

endorsements can not insulate it from the fact that its content expressly advocates Mr. Hyde's election. *Id.*

Since this Office believes that the SOC newsletter contains express advocacy under the standard set forth in 11 C.F.R. § 100.22(a), as well as *MCFL*, the Commission need not decide whether it meets the standards articulated by other courts or 11 C.F.R. § 100.22(b). Nonetheless, the SOC newsletter appears to meet the standards for express advocacy set forth in the regulation and in the *Furgatch* and *Christian Coalition* cases. As in *Furgatch*, the respondent's newsletter is not merely an issue advocacy piece, but instead contains a "clear plea for action" on behalf of a clearly identified candidate. *Furgatch* at 874. The action called for is unmistakably a vote for Henry Hyde on November 3rd. Reasonable minds could not differ as to whether it encourages readers to vote for Mr. Hyde. *See* 11 C.F.R. § 100.22(b). The respondent basically attempts to dispute this by stating that it disagrees with the complainant's interpretation; one source of putative disagreement, however, cannot destroy what would be obvious to the typical reasonable mind. The newsletter does not suggest that readers should contact Congressman Hyde to express their views on airport issues; in fact, no information is provided on how a recipient might contact the Congressman.

That the SOC newsletter contains express advocacy is also supported by the recent *Christian Coalition* decision. As demonstrated above, the SOC newsletter "in effect contain[s] explicit directives," in the form of "action verbs or their functional equivalents," urging electoral action, and in the context of the entire communication, one of those actions is to re-elect Henry Hyde. The underlying facts are very similar in these two cases. Both the SOC newsletter and the *Christian Coalition* cover letter are directed

to readers as voters and alerts them to an upcoming election. And, while both communications discuss other races involved in the election, they each advocate in particular the election of one specific individual. The candidacies of both Newt Gingrich in the Christian Coalition letter and Henry Hyde in the SOC newsletter are elevated above all others mentioned. In neither one are the identities of opponents or their positions on the issues identified. It might even be said that the paragraph on the last page of the newsletter that discusses Henry Hyde's efforts, achievements and strengths on O'Hare Airport expansion is just a different way of saying that the Congressman is a "SOC 100 percenter." The "unmistakable meaning" of the publication is that because Henry Hyde holds the same positions as the SOC and is its champion in Congress, the reader should vote for him on November 3rd. While "marginally less direct" than saying "Vote for Henry Hyde," the newsletter is in effect explicit that readers "should enter the voting booth with the knowledge that" Henry Hyde supports the SOC's agenda in full and therefore readers "should vote for him." *Christian Coalition* at 65.

2. Was the SOC a Corporation During the Relevant Time Period?

Although the caption affixed to the response seems to indicate otherwise,¹³ public information reveals that the respondent may indeed have been a corporation during the relevant time period. According to the Office of the Secretary of State in Illinois, the organization was incorporated as a Not For Profit Corporation on August 18, 1996. (Attachment 2) The three directors listed on the incorporation documents are John C. Geils, Ronald Wietcha and Edward E. Sherwood. At the time of incorporation, they

¹³ The caption refers to the SOC as "an unincorporated association of Illinois' municipal corporations."

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were, respectively, the President of Bensenville, the Mayor of Park Ridge and the Mayor of Des Plaines. Mr. Geils is also the current Chairman of the SOC and in that capacity he provided the affidavit enclosed with the response. The SOC's purpose is described as being "Social and Educational." The Secretary of State's office has affirmed that the corporation has been continuously registered as a corporation since 1996 and is currently in "good standing" with the state of Illinois. According to a report prepared by Dun & Bradstreet, the SOC is a non-profit corporation comprised of municipal governments which has no stock ownership or principals. It is further described as an "urban planning and consulting agency." (Attachment 3) Given that the SOC newsletter contained express advocacy, and was distributed to the general public, this Office recommends that the Commission find reason to believe that the Suburban O'Hare Commission may have violated 2 U.S.C. § 441b by making a prohibited corporate expenditure.

The SOC would not be making a prohibited corporate expenditure if the group was a "qualified nonprofit corporation" within the meaning of 11 C.F.R. § 114.10. A review of the currently available documents appears to indicate that the SOC fulfills at least some of these criteria. The incorporation documents and the Dun & Bradstreet reports appear to confirm that the non-profit Suburban O'Hare Commission was not formed by a business corporation or union. It also appears from the response provided

and publicly available sources that the SOC was formed to promote what can be termed "political ideas."

The information developed thus far also indicates that the SOC's activities are primarily funded through a per capita contribution from its member municipalities and that it has no shareholders. The figures currently available indicate that the amount is around \$1.20 per capita. In 1997 these contributions amounted to a total budget of \$345,000. Julie Johnson, *Turbulence Hits O'Hare Noise Foes: Towns Exit SOC, Joining City-Backed Arch Rival*, Crain's Chicago Business, August 25, 1997, at 1, available in 1997 WL 8944198. Accounting and payroll services are apparently donated by members on some sort of rotating basis. The SOC reputedly has an office in Bensenville and employs a staff of one. Denise Linke, *Council Offers Accounting*, Chicago Tribune, September 3, 1999, at 5, available in 1999 WL 2908551. However, it is not known at this time whether the SOC accepted, directly or indirectly, funding from any corporations or labor organizations for its many different activities, or had a policy of not doing so. It may also be that some of its enumerated activities, such as operating and maintaining a radar and noise monitoring system, may have been "business" activities. Thus, further information must be gathered before a determination can be made as to whether the respondent is qualified for the exemption from the prohibitions of 2 U.S.C. § 441b. Whether or not the SOC was a "qualified non-profit corporation," its communication, which contained express advocacy, if over the \$250 threshold, required a filing with the Commission, see 11 C.F.R. §§ 109.2 and 114.10(e), and should have had a disclaimer as required by 2 U.S.C. § 441d. Such a disclaimer would have had to accurately disclose the person(s) paying for the publication of the newsletter and stated whether the

communication was authorized by a candidate or candidate's committee. Therefore, this Office recommends that the Commission find reason to believe that the Suburban O'Hare Commission violated 2 U.S.C. § § 434(c) and 441d.

III. INVESTIGATION

If the Commission approves this Office's recommendations, the Office of General Counsel plans to engage in limited informal discovery. We intend to request additional information from the Suburban O'Hare Commission relative to its possible status as a "qualified non-profit corporation," the costs associated with publishing and distributing the "SOC News" at issue, and to the number of newsletters distributed. After the receipt and evaluation of the SOC's response, this Office believes it will be able to resolve the outstanding questions and make appropriate recommendations within a relatively short period of time.


IV. RECOMMENDATIONS

1. Find reason to believe that the Suburban O'Hare Commission violated 2 U.S.C. § 441b.
2. Find reason to believe that the Suburban O'Hare Commission violated 2 U.S.C. § 434(c).

3. Find reason to believe that the Suburban O'Hare Commission violated 2 U.S.C. § 441d.
4. Approve the attached Factual and Legal Analysis with the appropriate letter.

Lawrence M. Noble
General Counsel

10/20/00
Date

BY: 
Lois Lerner
Associate General Counsel

Attachments:

1. Factual and Legal Analysis
2. Incorporation Documents from the Office of the Secretary of State in Illinois
3. Dun & Bradstreet Reports

Staff Assigned: Marianne Abely



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *KCS*

DATE: October 23, 2000

SUBJECT: MUR 4922 -First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

DISTRIBUTION

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☒

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES *MW*
COMMISSION SECRETARY

DATE: OCTOBER 26, 2000

SUBJECT: MUR 4922 - First General Counsel's Report
dated October 20, 2000.

The above-captioned document was circulated to the Commission
on Monday, October 23, 2000.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Smith	<u>XXX</u>
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for Tuesday,

October 31, 2000. Please notify us who will represent your Division before
the Commission on this matter.